FERCO SEATING SYSTEMS (M) SDN BHD

v.

PRODUCT PEOPLE PTY LTD

HIGH COURT MALAYA, KUALA LUMPUR
TENGKU MAIMUN J
[SUIT NO: S4-22-393-2007]
29 NOVEMBER 2007

CIVIL PROCEDURE: *Striking out - Writ and statement of claim - Foreign defendant company with local and foreign address - Cause of action and existing facts - Whether within local jurisdiction - Submission to non-exclusive jurisdiction of foreign courts and reference to foreign mediation in deed - Whether excluded court's jurisdiction - Service - Whether out of jurisdiction and leave to be obtained*

CIVIL PROCEDURE: *Service - Setting aside - Foreign defendant with local and overseas address - Whether service out of jurisdiction - Whether leave to be obtained*

The plaintiff filed a suit against the defendant Australian company for alleged wrongful termination of a contract and in filing the writ of summons the plaintiff stated therein the defendant's local and Australian address. The defendant applied to set aside/strike out the writ and statement of claim and service thereof on the following grounds: (1) that the court lacked jurisdiction to try the action as the cause of action and facts that existed did not occur within the local jurisdiction of the court; (2) that the plaintiff had agreed in a deed to submit to the non-exclusive jurisdiction of the courts of New South Wales, Australia and agreed to refer disputes to mediation in New South Wales; and (3) that the plaintiff did not obtain leave to serve out of jurisdiction. The deputy registrar allowed the defendant's application. Hence, the plaintiff's appeal.

Held (allowing the plaintiff's appeal):

(1) Since the relevant brochure issued by the defendant stated a Malaysian address, the defendant should positively announce the fact that it had ceased using the said address if indeed that was so. Whatever 'loose arrangement' the defendant might have had in respect of having an office space in Malaysia that failed to materialize did not negate the original publication of the Malaysian address because the 'loose arrangement' was only within the defendant's knowledge. (para 8)

(2) There was evidence that the defendant had a place of business in Kuala Lumpur, Malaysia. Also, there was no evidence to show that the defendant made known that the address was no longer effective. As such, the service of the writ and statement of claim need not be preceded by leave. (para 10)

(3) For the purposes of the current proceedings whereby the plaintiff's application for an injunction was pending to be heard *inter partes*, this court had the necessary jurisdiction under cl. 24.1.5 of the deed concerned. Under the said clause it was agreed that a party who sought urgent interlocutory relief might elect not to comply with the provisions of the clause, but only to the extent of the relief sought and for the period required to dispose of the application for interlocutory relief. Clause 24 was the clause governing disputes. (para 12)

(4) There were strong grounds for contending that the breach was committed in Malaysia as the notice seeking to terminate the deed was served in Malaysia. Hence, the cause of action arose in Malaysia. (para 13)

Case(s) referred to:
Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad [1995] 4 CLJ 283 CA ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 11, O. 12 r. 7, O. 92 r. 4

For the plaintiff - Liew Teck Huat; M/s TH Liew & Partners
For the defendant - Douglas Ling; M/s Raja, Darryl & Loh

Reported by Usha Thiagarajah

JUDGMENT

Tengku Maimun J:

[1] The plaintiff had filed a suit against the defendant for alleged wrongful termination of a contract and in filing the writ of summons the plaintiff had stated the address of the defendant to be:

1. The Product People Pty Limited

22nd Floor, The Mall
Place Putra
100, Jalan Putra
50350 Kuala Lumpur

Dan/atau

2. 1203B, Level 12
1 Newland Street
Bondi Junction
New South Wales
Australia

[2] The defendant filed an application pursuant to O. 12 r. 7 of the Rules of the High Court 1980 and/or under the inherent powers of the court pursuant to O. 92 r. 4 of the RHC 1980 to set aside the writ and the statement of claim and the service thereof and also to strike out the writ and statement of claim on the following grounds:

i. That the court has no jurisdiction to try this action where neither the cause of action nor the facts on which the proceedings are being based exist or are alleged to have occurred within the local jurisdiction of the court.

ii. That the plaintiff has not proceeded to refer the alleged dispute to mediation as provided for in the Box Seats Licence Deed (Deed) dated 8 November 2005.

iii. That the defendant is not a registered company and/or has its place of business within the jurisdiction of this court.

iv. That the plaintiff should have obtained leave to issue and serve a notice of writ of summons of which is to be served out of jurisdiction on the defendant, as the defendant is a company not within the local jurisdiction of the court.

v. That the alleged service of the writ of summons together with the statement of claim on the defendant on 18 May 2007 and acknowledged by a company known as GHD Perunding Sdn Bhd is defective and irregular.

vi. That the effect of the foregoing makes this proceeding a nullity.

[3] The application was allowed by the learned deputy registrar. Against that decision the plaintiff has filed an appeal *vide* encl 22. The main issue to be determined is thus whether the writ was validly issued and served on the defendant.

[4] There is no dispute that the defendant is a company incorporated in Australia. The dispute is whether the defendant does or does not have a place of business in Malaysia. If the answer is that the defendant has no place of business in Malaysia then clearly the issuance and the service of the writ on the defendant without leave of the court pursuant to O. 11 of the Rules of High Court is bad in law and liable to be set aside.

[5] For the plaintiff it was contended that the defendant has given notice to the world at large that it had a Malaysian address and presence as shown by a brochure/pamphlet issued by the defendant wherein the defendant had stated its Malaysian address as 22nd Floor, The Mall, Putra Place, 100 Jalan Putra 50350 Kuala Lumpur (exh. TRB12 encl. 17).

[6] The defendant does not dispute that the Malaysian address was stated in the brochure/pamphlet but averred that "… I must state that for the period 1 February 2006 to 31 May 2006, the defendant had a loose arrangement to reserve some office space at the Malaysian address but that did not materialize. The plaintiff was aware of this fact. During that period, in its brochure, the defendant stated the Malaysian address."

[7] In this regard the plaintiff denied having such knowledge and learned counsel for the plaintiff submitted that even if the defendant no longer has such a Malaysian address, the fact that the defendant did not publish or take any steps to give notice to the Malaysian public at large that it had done so, the defendant is estopped from denying the fact that it had a Malaysian address and presence. Learned counsel cited the case of *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283 wherein at p. 294 Gopal Sri Ram JCA said:

> The time has come for this court to recognize that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.

[8] I am with the plaintiff on this proposition. In the light of the publication via its brochure that it had an address in Malaysia, I am of the view that the defendant should positively announce the fact that the defendant had ceased using the said address if indeed it was so. Whatever 'loose arrangement' that the defendant may have in respect of having an office space in Malaysia that did not materialize would not in itself negate the original publication it had made on the Malaysian address because this fact about the 'loose arrangement' would essentially be only in the knowledge of the defendant.

[9] Learned counsel for the defendant submitted that the plaintiff knew at all times that the defendant had no place of business in Malaysia and highlighted the fact that the plaintiff had prior to the filing of the instant suit, filed a suit in High Court Civil 5. For the issuance of the Civil 5 suit the plaintiff has obtained leave to serve the writ out of jurisdiction.

[10] Insofar as I am concerned, I am satisfied that before me there is evidence in exh. TRB12 that the defendant has a place of business in Kuala Lumpur and there is no evidence to show that the defendant had made known that such address is no longer effective. Given that finding I therefore hold that the issuance and the service of the writ and the statement of claim on the defendant need not be preceded by leave.

[11] The other ground advanced by the defendant to set aside the writ was that this court has no jurisdiction since the deed provides that it shall be governed by and construed pursuant to the laws for the time being in force in New South Wales and that both the plaintiff and the defendant had agreed to submit to the non-exclusive jurisdiction of the courts of New South Wales. Further, pursuant to the deed, parties had also agreed to refer their disputes to mediation in New South Wales.

[12] I am of the view that for the purposes of the current proceeding whereby the plaintiff's application for an injunction is pending to be heard *inter partes*, this court has the jurisdiction under cl. 24.1.5 of the deed which provides:

> A party who seeks urgent interlocutory relief may elect not to comply with the provisions of this clause, but only to the extent of the relief sought and for the period required to dispose of the application for interlocutory relief.

(Clause 24 is the clause governing disputes).

[13] I am further in agreement with learned counsel for the plaintiff that there are strong grounds for contending that the breach was committed in Malaysia as the notice seeking to terminate the deed was served in Malaysia. Hence the cause of action arose in Malaysia. In the circumstances the plaintiff's appeal in encl. 22 was allowed with cost.